

On appeal from a summary conviction in the Provincial Court on January 11, 2012.

Date: 20131016
Docket: CR 12-01-31642
(Winnipeg Centre)
Indexed as: R. v. Adamiec
Cited as: 2013 MBQB 246

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN,)
)
Respondent,)
)
- and -)
)
GRZEGORZ PAWEL ADAMIEC,)
)
(Accused) Appellant.)

COUNSEL:

For the Crown:
Colin B. Soul

For the (Accused) Appellant:
G. Gregory Brodsky, Q.C.
Ursula B. Goeres

Judgment delivered:
October 16, 2013

MAINELLA J.

I. INTRODUCTION AND ISSUE

- [1] George Orwell warned that lurking behind the fun offered by competitive sports is the threat of the arousal of “the most savage combative instincts”. See George Orwell, “The Sporting Spirit” in ***Essays*** (London: Penguin Books Ltd., 1994) 321 at 322. Such ferocious antagonism occurred one summer evening in Winnipeg during an amateur soccer match between the Kildonan Cavaliers (“the Cavaliers”) and the Polonia Soccer Club (“Polonia”). A rough play during that contest raises the difficult legal controversy of: When does misconduct during sport become a crime?

- [2] Late in the match, with the score tied, Grzegorz Pawel Adamiec (a midfielder for Polonia) and the complainant (the Cavaliers' goalkeeper), vied for control of a loose ball in the Cavaliers' penalty area. The players collided and the complainant suffered injuries from Adamiec who kicked him with his cleats.
- [3] This "on-the-ball" foul did not end with the yellow card Adamiec received from the referee. A charge of assault causing bodily harm, contrary to section 267 of the ***Criminal Code***, R.S.C. 1985, c. C-46, was laid by police. Adamiec was found guilty after a summary conviction trial and now appeals.
- [4] The issue in this appeal is whether the trial judge correctly applied the legal principle of consent to the rough play in reaching her verdict.
- [5] Adamiec says competitive amateur soccer is a contact sport. Its playing culture recognizes that significant injuries may occur in the heat of the match. The incident was not a sufficiently grave enough occurrence beyond soccer's playing culture to be considered a crime. For the following reasons I agree; the appeal is allowed.

II. **BACKGROUND**

- [6] The Manitoba Major Soccer League ("the MMSL") is a large amateur adult league. Teams are grouped in divisions based on degrees of competitiveness.
- [7] In 2009, the Cavaliers and Polonia were members of the MMSL's Second Division. The level of play in the Second Division was very competitive.

- [8] The Cavaliers played Polonia in a regular season match on July 13, 2009. There was historic enmity between the teams. Play that day was grotty and combative; it was marred by unsportsmanlike conduct and rough play. Six yellow cards were shown by the referee, Billy Senior, for various fouls.
- [9] Near the end of the second half, the ball went into the Cavaliers' penalty area and a scramble for it ensued. Adamiec and the complainant both attempted to gain control of the ball and collided. The complainant dove towards the ball, grabbing it and Adamiec's right leg at the same time. Adamiec stumbled and attempted to get his foot out of the complainant's grasp by kicking. Once free of the complainant's grasp, Adamiec lost his balance and fell backwards away from the complainant. While falling he continued kicking the complainant. When he hit the ground, he continued to kick the complainant from the seated position. According to the eyewitness account of the referee, the entanglement of the two players was short lived and lasted only a few seconds. Adamiec stopped kicking the complainant once the whistle was blown.
- [10] The kicking by Adamiec resulted in his cleats striking the complainant several times in the jaw, neck, chest, and left hip. The complainant received serious long-lasting injuries to his neck and jaw and significant bruising to his left hip. The complainant had difficulty moving his head for some time and experienced an ongoing choking sensation. It was not until six months later, after the complainant received specialized medical treatment in California, that he fully recovered from his injuries.
- [11] The referee called a foul over the rough play and broke up a melee of players who immediately congregated. Adamiec's infraction was trying to get his foot away from the complainant's grasp by kicking in a reckless manner. The referee testified, "I thought he used just a little bit too much force." The referee did not believe it was an intentional act to injure, nor was the amount of force used by Adamiec necessitating a red card

sending Adamiec off the field of play. The referee awarded the Cavaliers a direct free kick and additionally cautioned Adamiec by showing him a yellow card for the foul.

[12] According to the rules of soccer, a player is to be cautioned and shown a yellow card when, in the opinion of the referee, the player engages in “unsporting behaviour”. Unsporting behaviour includes the reckless commission of an offence, such as kicking or attempting to kick an opponent, that results in a direct free kick by the opposing team. See Fédération Internationale de Football Association, ***Laws of the Game 2013/2014***, Zurich: FIFA, 2012 (“the rules of soccer”), law 12.

[13] If, in the opinion of the referee, the actions of a player when challenging for a ball in play amount to a more serious infraction of the rules of soccer, such as the use of excessive force or brutality against an opponent, that is considered a “serious foul play” and the player is to be shown a red card and sent off the field. See the rules of soccer, law 12.

[14] The day after the match, the complainant filed a formal complaint with the MMSL against Adamiec for what had happened and the resulting injuries. Players on teams competing in the MMSL may face disciplinary action for on-field conduct either from the MMSL or, in more extreme cases, from the provincial governing body, the Manitoba Soccer Association. The MMSL took no administrative action against Adamiec for the rough play. The complainant then filed a complaint with the Winnipeg Police Service on July 17, 2009. After a police investigation, Adamiec was charged with assault causing bodily harm.

III. TRIAL JUDGE’S DECISION

[15] The trial judge heard conflicting versions of what occurred in the Cavaliers’ penalty area. In light of the injuries the complainant suffered, which were significant and undisputed, the trial judge accepted the version

of events as described by the referee and by the two Cavaliers players who testified: Paul Sheridan and Christophe Heral. On appeal, Adamiec concedes that the trial judge's findings of fact as to what occurred in the Cavaliers' penalty area are entitled to deference. What is contentious is the trial judge's application of the legal principle of consent in the circumstances.

[16] The trial judge framed the issue of consent this way in her judgment:

There is no dispute that soccer, particularly at the level of the Manitoba Major Soccer League, is a contact sport. The question is then whether Mr. Adamiec's actions were, as the defence suggests, a normal part of the game.

[17] The trial judge determined on the evidence she accepted that Adamiec used excessive force against the complainant without legal justification. She ruled that the force Adamiec applied to the complainant during the skirmish for the ball in the Cavaliers' penalty area was "beyond the scope of the game" and resulted in bodily harm to the complainant that was objectively foreseeable having regard to the manner in which the force was applied.

[18] Accepting the Crown had negated consent to the rough play in the Cavaliers' penalty area, the trial judge did not go on in her reasons to consider whether the Crown had proven that Adamiec did not have an honest but mistaken belief that the complainant had consented to the force used (see section 265(4) of the ***Criminal Code***). That omission is not a ground of appeal advanced by Adamiec. The appeal focuses solely on the Crown's failure to negate consent as required by section 265(1)(a) of the ***Criminal Code***.

IV. LEGAL PRINCIPLES

A. THE DEFINITION OF ASSAULT

[19] Section 265(1)(a) of the ***Criminal Code*** states as follows:

Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

Voies de fait

265. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :

a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;

[20] An essential ingredient of the crime of assault is for the Crown to prove beyond a reasonable doubt, as part of the *actus reus* of the offence, an absence of consent, express or implied, by the victim to the intentional application of force. See **R. v. MacTavish** (1972), 8 C.C.C. (2d) 206 at 208 (N.B.S.C. (A.D.)), **R. v. Abraham** (1974), 30 C.C.C. (2d) 332 at 334 (Que. C.A.), and **R. v. Leclerc** (1991), 67 C.C.C. (3d) 563 at 567 (Ont. C.A.).

B. MEANING OF CONSENT IN THE CONTEXT OF CONTACT SPORTS

[21] For the purpose of the application of section 265(1)(a) of the **Criminal Code**, the starting point is that a person cannot consent to death being inflicted on them or to serious harm that is intended and caused to them. See section 14 of the **Criminal Code**, **R. v. Jobidon**, [1991] 2 S.C.R. 714 at 760, and **R. v. Paice**, 2005 SCC 22, [2005] 1 S.C.R. 339 at paras. 11-18. However, a person can consent to suffering bodily harm where the public interest requires an exception to the general prohibition such as in the case of reasonable surgical interference.

[22] Applying the criminal law strictly to recognized contact sports such as soccer is controversial. There are conflicting interests.

[23] Unlawful violence needs to be discouraged on the soccer pitch or other sporting forum just as much as elsewhere in society. It should not be forgotten that soccer cleats, like many forms of sporting equipment, are

weapons. (See the definition of “weapon” in section 2 of the ***Criminal Code***.) They can be used to cause injury, as occurred in this case in the Cavaliers’ penalty area.

[24] At the same time, sport plays a central cultural role in society. History is replete with human beings engaging in competition and civil society, recognizing the importance of sport. For example, warfare between city-states was for centuries, with few exceptions, temporarily suspended in ancient Greece prior to and during Panhellenic athletic contests at Olympia, Delphi, Nemea, and Isthmia to allow for sporting competition to take place. See Stephen G. Miller, ***Ancient Greek Athletics*** (New Haven: Yale University Press, 2004) at 216-23. Professor John Barnes summarizes the societal interest of sport this way:

... Robust games are pragmatically accepted because of their social utility in providing exercise and entertainment, and rough team sports have been especially prized for offering a rule-controlled environment in which to teach the hard-knock lessons of life. In spite of their toll of injuries, the established sports are not banned because society has faith in their value and has invested heavily in their diversionary and educational functions. Particular blows or shots may, nevertheless, bring criminal prosecution.

[Footnote omitted]

See John Barnes, ***The Law of Hockey*** (Markham, Ont.: LexisNexis Canada Inc., 2010) at 204.

[25] The importance of sport to civil society is demonstrated by Parliament legislating which sports are recognized to be Canada’s national sports (i.e. ice hockey and lacrosse). See ***National Sports of Canada Act***, S.C. 1994, c. 16. These sports have played an important part of Canadian identity and culture since long before Confederation, or in the case of lacrosse, prior to European exploration and settlement of Canada. This formal symbolism by Parliament is similar to other ties that bind all Canadians, like the national flag, the national anthem, and the official languages to name but a few.

[26] The Canadian experience is not unique. Sport, and often specifically soccer, is part of the sinew of many nations. For example, David Goldblatt describes the importance of soccer to one South American country, Uruguay, a soccer superpower in the first half of the twentieth century, this way:

... It is difficult to underestimate the degree to which national identity and pride became tied to the fate of the national team – *La Celeste*. Uruguay, a country of not even 3 million people whose creation was the bizarre outcome of great power politics, had hitherto made no impact on the wider world. Now, as Eduardo Galeano has written, 'The sky-blue shirt was proof of the existence of the nation: Uruguay was not a mistake. Football pulled this little country out of the shadows of universal anonymity.' While Brazil and Argentina had other historical materials and cultural resources from which to fashion a distinct modern nationalism, in Uruguay the cupboard was bare. The equation of the nation and the national football team, already widespread in Uruguay in the 1930s and 1940s, was permanently sealed in 1950 when, under Obdulio Varela's magnificent, obstinate captaincy, Uruguay beat Brazil in the miracle of the *Maracanazo*. As Ondino Viera, coach of the Uruguayan team at the 1966 World Cup, put it: 'Other countries have their history, Uruguay has its football.' Uruguay is perhaps the extreme case, but it is not alone in finding its history suffused with football.

[Footnotes omitted]

See David Goldblatt, *The Ball is Round — A Global History of Football* (London: Viking, 2006) at 264-65.

[27] Because of the social utility of sports like soccer, the application of the criminal law is adjusted in the sporting context. The common law accepts that players of organized contact sports implicitly consent to some forms of intentional contact against them, and the risk of injury that, outside the sporting arena, would otherwise constitute the crime of assault. In *R. v. Brown*, [1993] 2 W.L.R. 556 at 592-93 (H.L.), Lord Mustill stated:

Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a mid-point between fighting, where the participant knows that his opponent will try to harm him, and the milder sports where there is at most an acknowledgement that someone may be accidentally hurt. In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately.

[28] Therefore, for the purpose of applying the legal principle of consent, the general rule that a person cannot consent to serious harm that is intended and caused is subject to exception, if the activity in question engaged in has “significant social value” as is the case of contact sports such as soccer. See **Jobidon** at pp. 766-67.

[29] Most lawful organized sports, such as soccer conducted under the auspices of the MMSL, have disciplinary procedures to deal with injuries caused on the playing field in contravention of the sport’s rules. The civil law also provides remedies for sporting misconduct. Criminal prosecution is reserved only for those situations where the conduct in the sporting context is “sufficiently grave to be properly categorised as criminal.” See **R. v. Barnes**, [2004] EWCA Crim 3246, [2005] 1 W.L.R. 910 at 913. Gonthier J. explained the balance the criminal law strikes this way in **Jobidon** at pp. 766-67:

Stated in this way, the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game. Unlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile. In this regard the holding of the Saskatchewan Court of Appeal in **R. v. Cey**, *supra*, is apposite.

The court’s majority determined that some forms of intentionally applied force will clearly fall within the scope of the rules of the game, and will therefore readily ground a finding of implied consent, to which effect should be given. On the other hand, very violent forms of force which clearly extend beyond the ordinary norms of conduct will not be recognized as legitimate conduct to which one can validly consent.

[Emphasis added]

[30] In deciding the issue of consent in an allegation of assault committed in the context of a contact sport, proof of an absence of consent requires the court to be satisfied beyond a reasonable doubt that the use of force was beyond the rules, norms and customs of the sport in question (i.e. the “playing culture”) bearing in mind

the circumstances of the particular game where the alleged assault occurred. See **R. v. Cey** (1989), 48 C.C.C. (3d) 480 at 488-91 (Sask. C.A.), and **Barnes** at pp. 914-15.

[31] The concept of “playing culture” in an application of the legal principle of consent is not to be equated with only the formal written rules of a particular sport; in this case the rules of soccer. It is a broader concept. Each sport has its own ethos developed over time. Playing culture is the product of the formal rules of a sport, its unwritten rules, norms and customs developed over time. See **R. v. McSorley**, 2000 BCPC 116, [2000] B.C.J. No. 1993 at paras. 17-25 (Crim. Div.) (QL). Playing culture is also not a static concept. It changes over time as the sport evolves. For example, greater awareness and concern over concussions is gradually leading to not only formal rule changes in many team sports, but also cultural adjustments in the permissible manner of play, all for the goal of improving player safety.

[32] The criminal law tolerates a certain degree of physical contact on the playing field, which may be contrary to the formal rules of the particular sport, but it is acknowledged by tradition to be part of the playing culture of that sport. For example, in soccer a mistimed tackle is a common foul and part of the playing culture of the game. Not every improper tackle (regardless of the injuries inflicted) during play warrants criminal prosecution. See Simon Gardiner et al., **Sports Law**, 4th ed. (London: Routledge, 2012) at 518.

[33] The application of force by an athlete in compliance with the rules of a particular sport during play, while not conclusive for the purpose of the criminal law, is firm indication that the conduct is not criminal. See **R. v. Bradshaw** (1878), 14 Cox C.C. 83 at 85 (Assize Ct.), **Barnes** at p. 914, and **Cey** at p. 490.

[34] In contrast, extreme violence on the sports field away from play (i.e. “off the ball”) contrary to the rules of a particular sport has resulted in successful prosecutions for assault related crimes. Negating consent to

contact in such situations is less controversial as the facts typically speak for themselves and cry out for the intervention of the criminal law. For example: **Ferguson v. Normand**, [1995] SCCR 770 (head butt of an opposing player prior to a free kick in a professional soccer game in Scotland); **McSorley** (slash to head of an opposing player from behind, away from play in a professional hockey game); **R. v. Mayer** (1985), 41 Man. R. (2d) 73 (Prov. Ct.) (sucker punch to player with his back turned during a break from a junior hockey game). See John Barnes, **Sports and the Law in Canada**, 3d ed. (Markham, Ont.: Butterworths Canada Ltd., 1996) at 255, and Gardiner, **Sports Law** at p. 517.

[35] Application of force in very close proximity of play (i.e. “on the ball”) that is contrary to the rules of the sport, as was the situation in the Cavaliers’ penalty area, is the most troublesome scenario for the criminal courts. Gerwing J.A. commented on this grey area this way in **Cey** at p. 490:

Between, on the one hand, those forms of intentional bodily contact sanctioned by the rules and thus ordinarily included within the scope of the implied consent and, on the other, those forms which are beyond the rules and so violent as to be obviously excluded from consent, lie a host of others, many of which will present uncertainty. Since this is a matter of degree, the question becomes what, in general, is it that serves to distinguish those which exceed the ambit of the implied consent from those which do not.

[36] The ambit of consent to the application of force in the context of a team sport such as soccer, for the purpose of section 265(1)(a) of the **Criminal Code**, is to be determined by a cumulative consideration of objective criteria, including:

- the type of sport;
- whether the rules of the game contemplate contact or non-contact;
- the level at which the sport is played – professional, amateur, recreational and so on;

- the nature of the act or acts which forms the subject matter of the charge and the surrounding circumstances;
- the degree of force employed;
- the extent of the risk of injury; and
- the state of mind of the accused.

See **Cey** at pp. 490-91, **Barnes** at pp. 914-15, **Leclerc** at p. 571, and **R. v. Ciccarelli** (1989), 54 C.C.C. (3d) 121 at 126 (Ont. Dist. Ct.).

[37] In making this assessment about the ambit of consent in the contact sports context, and whether the Crown has negated consent in the individual circumstances, the court should recognize certain realities of highly competitive contact sports, such as soccer. Conduct that is contrary to the formal rules of the sport can be expected to occur in the heat of the moment. It is often the case that, in the course of play, players often use force instinctively, in reflex reaction to the circumstances of the moment. See **Barnes** at pp. 914-15, and **Leclerc** at p. 573. As Bastin J. commented in **Agar v. Canning** (1965), 54 W.W.R. 302 at 304 (Man. Q.B.), aff'd (1966), 55 W.W.R. 384 (Man. C.A.):

The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.

C. STANDARD OF REVIEW

[38] The trial judge's determination of what occurred in the Cavaliers' penalty area involves questions of fact, which attract the standard of review of palpable and overriding error. However, interpretation of the legal principle of consent and its application is a question of law. See **R. v. Ewanchuk**, [1999] 1 S.C.R. 330 at

paras. 21-22. The trial judge's conclusion on the cumulative consideration of objective criteria as to the ambit of consent to the use of force and the application of that standard to the facts she found are subject to review for correctness. See **R. v. Shepherd**, 2009 SCC 35, [2009] 2 S.C.R. 527 at para. 20, and **R. v. Keepness**, 2010 SKCA 76, [2010] S.J. No. 326 at para. 19 (QL).

V. ANALYSIS AND DECISION

A. INTRODUCTION

[39] On review of the trial judge's reasons for judgment, I am satisfied, for the purpose of section 686(1)(a)(ii) of the **Criminal Code**, that the trial judge erred in law by failing to correctly apply all of the objective criteria cumulatively in deciding whether Adamiec's conduct in the Cavaliers' penalty area went beyond the playing culture of soccer such that the Crown negated consent for the purpose of section 265(1)(a) of the **Criminal Code**.

[40] While recognizing amateur soccer at the level of the MMSL is a highly competitive contact sport, the trial judge over-emphasized the importance of the degree of force employed against the complainant and the resulting injuries and ignored or de-emphasized the importance of other objective criteria.

B. SUMMARY - OBJECTIVE CRITERIA

[41] A summary of the objective criteria as to the circumstances of the alleged assault in the Cavaliers' penalty area in the soccer match between the Cavaliers and Polonia in the evidence before the trial judge is as follows:

- Type of sport: Soccer is a contact team sport.

- Rules and playing culture: The rules and playing culture of soccer permit physical contact; serious injuries during play are not uncommon.
- Level of play: Match play in the MMSL, while amateur soccer, is highly competitive.
- Nature of act: The kicking by Adamiec occurred in the context of a scoring play where his right leg was first held by the complainant goalkeeper. Adamiec's act was an on-the-ball foul.
- Degree of force employed: Force caused serious injuries in the course of reckless reactive kicks.
- Extent of risk of injury: The risk of collision and resulting injury is high in the course of potential scoring play.
- State of mind of Adamiec: There was no evidence that Adamiec's state of mind to use force was anything but for a legitimate sporting purpose in the heat of the moment. The referee judged the conduct as reckless, not an intentional attempt to injure.

C. ANALYSIS

[42] Soccer is accepted to be a contact team sport. While not as violent a sport as rugby, American football, lacrosse, or ice hockey, physical contact is an essential element of soccer and its rules permit contact. See **Brown** at pp. 59293. The referee explained in his evidence that extreme forms of physical contact between players are not necessarily contrary to the rules of soccer, let alone beyond its playing culture particularly in a competitive league such as the MMSL.

- [43] The trial judge acknowledged in her reasons the competitive nature of amateur soccer in the Second Division of the MMSL, but did not in my view adequately ascribe the necessary significance to play at that competitive level.
- [44] According to the evidence of the complainant (an experienced goalkeeper), it is foreseeable that a goalkeeper in a competitive amateur soccer game faces the risk of being stepped on or kicked in a struggle for control of the ball. It had happened to the complainant many times before the game with Polonia resulting in broken bones and medical attention.
- [45] Such physical contact would be less tolerated in a recreational or developmental league or a league with “no contact” rules. See ***R. v. Krzysztofik (G.)*** (1992), 79 Man. R. (2d) 234 at para. 10 (Q.B.). However, the evidence before the trial judge was that injuries that would constitute “bodily harm” as defined in section 2 of the ***Criminal Code*** occur frequently during play in the MMSL.
- [46] In considering the nature of Adamiec’s act of kicking the complainant, the trial judge placed too much emphasis on the outcome of the incident and failed to consider the context of the conduct. What is germane is not the quantity of the physical contact, but its qualities. There is an important distinction between “going for the ball” during play, which is legitimate sport, and “going for the victim,” which is not. See ***Barnes*** at p. 918.
- [47] Victory in soccer is defined by which team scores the most goals on the other team during the match. See the rules of soccer, law 10. Scoring a goal often occurs from a kick or header of the ball from a location close to the front of an opponent’s goal. As the referee testified, in soccer the front of a goal has “... lots of action. People want to score. People want to defend.”

[48] Adamiec and the complainant testified that the force applied to the complainant occurred as a result of "a 50/50 ball" (a play where two players have an equal chance to gain possession) near the Cavaliers' goal. There was a legitimate sporting interest in both players striving to gain control of the ball; one to score, the other to defend.

[49] The trial judge concluded that Adamiec did not kick the complainant before the complainant grabbed Adamiec's right leg. That finding of fact is important. In soccer it is an infraction to hold an opponent, particularly if the holding gives the other side an advantage in play. See the rules of soccer, law 12. The referee considered calling a foul, which would have resulted in a penalty kick for Polonia, against the complainant for grabbing Adamiec's leg in the Cavaliers' penalty area while the two struggled for control of the ball:

A Yeah. For a split second I was considering calling an infraction against the goalie for holding on to a player's leg.

Q Right. Because that's not legal for them --

A No.

Q -- to do either?

A No.

Q I mean, they can go and grab the ball --

A Right.

Q -- right?

A But in my mind you have to sort out again is he trying to do that or is he just -- with all the legs and stuff down there is he just inadvertently holding on to the opposing player's leg? That's why I have to decide in that second.

Q Okay.

A Because if that's the case, then it's not a penalty shot.

Q Yeah. Fair enough. But the thought obviously did cross your mind?

A Yes, it did.

Q And, I mean, because a lot of refereeing comes down to discretion, right?

A Absolutely, yeah.

[50] According to the evidence of the referee and Messrs. Sheridan and Heral, which the trial judge accepted, part of Adamiec's kicking was due to the fact the complainant had grabbed his right leg as part of attempting to grab the ball.

[51] Struggle for control of the ball is part of the essence of soccer, particularly close to a goal. In such a competitive setting as was the match here, it cannot be said that players do not consent to the high risk of injury and the potential of receiving reckless force from an opponent in such a struggle for a loose ball in the penalty area proximate to one side's goal. Adamiec was quite within his rights under the playing culture of soccer to pursue his scoring chance, particularly as he was being grabbed at the same time by the complainant.

[52] It is undisputed that the degree of force employed by Adamiec during his kicking was significant. The injuries of the complainant amounted to "bodily harm" within the meaning of section 2 of the ***Criminal Code***.

[53] However, there is no evidence to suggest, and the trial judge did not conclude, that Adamiec's actions were anything more than reckless reactive kicks in the heat of the game. While finding Adamiec to be an unbelievable and unreliable witness, the trial judge accepted the referee's impression of Adamiec's state of mind when kicking the complainant. She stated:

... He did not think Mr. Adamiec was intentionally trying to injure the keeper but was trying to extricate his leg. He thought Mr. Adamiec used a little too much force and was reckless in doing so.

...

Mr. Senior said he showed Mr. Adamiec a yellow card for removing his foot in a reckless manner because he felt Mr. Adamiec used too much force. He did not show Mr. Adamiec a red card because he did not think Mr. Adamiec was intentionally trying to injure [the complainant].

[54] There was no intent to injure the complainant or to use force for anything but a legitimate sporting purpose, albeit done in a manner contrary to the rules of soccer. Adamiec's use of force was not motivated by a non-sporting purpose such as an intentional retaliatory attack designed to injure an opponent, as opposed to advance play. See ***R. v. Owen***, [2004] O.J. No. 1410 (Sup. Ct. J.) (QL). Again, context is important in consideration of the risk of collision and resulting injury in a 50/50 ball in the course of a potential scoring play. The evidence before the trial judge was that the risk of serious injury is high in such situations. This does not excuse Adamiec's conduct but does place it in the correct frame of reference. See ***Owen*** at para. 70.

[55] The trial judge erred in law in concluding the Crown negated consent for the purpose of section 265(1)(a) of the ***Criminal Code***. A proper cumulative consideration of all of the objective criteria applied to the facts as found by the trial judge leads to the conclusion that although the conduct of Adamiec was contrary to the rules of soccer, it was not beyond soccer's playing culture, let alone gravely so, which is required for sporting misconduct to be a crime.

VI. CONCLUSION

[56] The judgment of the trial judge is set aside and a verdict of acquittal is entered.

_____. J.